Filed 10/4/10 In re M.G. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. M.G., Defendant and Appellant.	E049804 (Super.Ct.No. J226536) OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed as modified.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edward G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Daniel Rogers, Deputy Attorneys General.

On April 2, 2009, the San Bernardino County District Attorney's Office filed a petition under Welfare and Institutions Code section 602, subdivision (a), charging appellant M.G. (minor) with being in possession of marijuana for sale. (Health & Saf. Code, § 11359, count 1.) The petition was then amended to add the allegation that minor possessed more than 28.5 grams of marijuana. (Health & Saf. Code, § 11357, subd. (c), count 2.) Minor admitted the allegation in count 2, and the juvenile court dismissed the allegation in count 1. Minor was declared a ward of the court and placed on probation. On July 29, 2009, a subsequent petition was filed pursuant to Welfare and Institutions Code section 602, subdivision (a), alleging that minor possessed spray paint with the intent to commit vandalism or graffiti (Pen. Code, § 594.2, subd. (a), count 1)[1] and that he possessed 28.5 grams or less of marijuana (Health & Saf. Code, § 11357, subd. (b), count 2). Following the denial of a motion to suppress evidence, the court found the allegations in the petition to be true. The court continued minor's wardship and probation.

On appeal, minor contends: 1) the court erred in denying the motion to suppress; 2) there was insufficient evidence to support the court's true finding that he possessed the spray paint with the intent to commit vandalism or graffiti; and 3) the probation condition prohibiting him from associating "with any known probationer, parolee, or gang member" (condition No. 20) should be modified to include a definition of "gang." The

[1] All further statutory references are to the Penal Code unless otherwise indicated.

People concede, and we agree, that condition No. 20 should be modified. Otherwise, the judgment is affirmed.

FACTUAL BACKGROUND

On July 23, 2009, approximately four parole agents and four to six police officers went to a trailer residence to arrest a parolee who lived with minor. As the officers were going in the front entrance, they encountered a 12-year-old boy who said the parolee was not there. The officers found and detained the parolee in the open kitchen and living room. Others went in through the side door and saw that the parolee had been detained. Those officers proceeded to clear the other rooms to make sure there were no other people hiding in other rooms. The officers saw a man (minor's father) working in the kitchen on the cabinets. They allowed him to continue with his work, since they did not feel he was a threat. Some officers could hear the shower running, so they just made sure no one went in or out of the bathroom until they cleared the other rooms. The officers noticed a bedroom door that was closed at the end of the short hallway. The door was unlocked, so the officers entered the room and found minor in bed. Parole Agent Robert Jacobson identified himself and told minor to get up. Minor complied, and the officers removed him from the room and took him to the living room area. The officers cleared the room by looking in the closet, under the bed, behind the furniture, under stacks of clothing, anywhere a person could hide. While doing so, Agent Jacobson noticed graffiti all over the walls, as well as an open drawer with cash and a baggie of marijuana in it.

Police Officer Matthew Block arrived at the trailer and discussed the situation with Agent Jacobson. Officer Block spoke to minor, who was on the patio, and asked if there was anything illegal in his bedroom. Minor said there was marijuana. Officer Block then asked if minor was on probation, and minor admitted he was on probation for possessing marijuana. Officer Block and Agent Jacobson went back to minor's bedroom and seized the marijuana. Officer Block noticed the words, "Kaoz" and "Sin" written on the bedroom walls in spray paint and permanent markers. Officer Block asked minor if he did any graffiti, and minor said he did. Minor explained that he did not consider himself to be part of a tagging crew, and said that when he did graffiti, he usually did it by himself or with one or two friends. Minor said the last time he had done any graffiti was three months ago. When asked if he had a moniker, minor said he used to go by the moniker "Kaoz," but now he used the moniker "Sin." Officer Block seized the markers and spray paint and turned it over to the graffiti task force for destruction, per the police department's policy. Based on his training and experience with graffiti-related crimes, Officer Block testified at trial that spray paint was a common tool used for graffiti and vandalism. He further opined that the markers and spray paint found in minor's room could be used for graffiti.

ANALYSIS

I. The Trial Court Properly Denied the Motion to Suppress

Minor moved to suppress the items seized from his bedroom, arguing that the warrantless search of the trailer was not justified. The juvenile court denied the motion, holding that the search was justified as a protective sweep for officer safety purposes. On

appeal, minor claims that the court erred in upholding the search, since there was no reasonable suspicion to justify a protective sweep. We disagree and conclude that the trial court properly denied the suppression motion.

A. *The Suppression Hearing*

The sole witness at the suppression hearing was Agent Jacobson. He testified that he had been a parole agent for 17 years and was previously a police officer for the Riverside County Probation Department for eight years. Thus, he had 25 years of doing compliance checks and arrests. Regarding the search in question, Agent Jacobson said that he and the other officers were looking for the parolee in order to arrest him. He said that some of the officers went to the front entrance of the trailer and made contact with the 12-year-old boy, who told them the parolee was not there. The officers apparently saw the parolee, went in the front door, and arrested him. Agent Jacobson testified that, after securing the parolee, it was the job of the agents and officers to "clear any and all rooms while the parole agent of record is conducting an investigation on the parolee and finding out what is going on." He explained that oftentimes, the parole agents also needed to communicate with the families, which could take a while. As such, the officers had to make sure it was safe for all of the officers to be in the area. On cross-examination, Agent Jacobson agreed that he had no specific information that anyone was in the trailer who would pose a threat. He agreed that the sweep was "just procedure." However, on redirect examination, he said it was not procedure every time they did an arrest to clear a room. He explained that there were some cases where the officers or agents contact the parolee at the front door, arrest him, and leave. Every case was

different, depending on "the situation, time of day and manpower, neighborhood." When asked why they cleared the trailer in this case, he responded: "Because we had the manpower . . . . Plenty of us to go ahead and secure the . . . entire residence without having to feel the need to just extract the parolee and leave."

The court found that a combination of factors gave rise to a reasonable suspicion to justify a protective sweep. The factors included the agent's 23 years of experience;[2] the fact that the parolee was not a mere parolee, but a noncompliant parolee; that there were other family members or other people in the residence; and, that the 12-year-old boy lied about the presence of the parolee, which indicated some form of protection or sympathy for the parolee. The court further noted that the sweep was minimally intrusive. Defense counsel argued that the protective sweep was conducted only "because they had enough people to do it." However, the court disagreed with defense counsel, stating that it took Agent Jacobson's testimony to mean that "it was because there were enough officers, then the parolee could be interviewed and debriefed and searched there as opposed to merely doing a fast extraction so as to debrief him and interview him at another location." The court understood that "[b]ecause there were enough bodies involved[,] then that location could be used as opposed to the parole office or the police department." The court reiterated that it did not understand the agent's testimony to mean that simply having seven to 10 officers available justified the search.

[2] Agent Jacobson actually had 25 years of experience.

B. *Standard of Review*

In reviewing the denial of a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

C. *The Protective Sweep Was Justified*

A warrantless search by the police is invalid unless it falls within one of the exceptions to the warrant requirement. (*People v. Celis* (2004) 33 Cal.4th 667, 676 (*Celis*).) One recognized exigent circumstance that will support the warrantless entry of a home is "the risk of danger to police or others on the scene." (*Ibid*.) This exception "provides the justification for a 'protective sweep' of a residence under the high court's decision in [*Maryland v. Buie* (1990) 494 U.S. 325 (*Buie*)]." (*Id*. at pp. 676-677.) The *Buie* court held that "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Buie*, at p. 337.) In other words, a protective sweep "*does not* require probable cause to believe there is someone posing a danger to the officers in the area to be swept. [Citation.]" (*Celis*, at p. 678.) It "can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person. [Citation.]" (*Ibid*.) "A 'protective sweep' is a quick and limited search of the premises." (*Buie*, at p. 327.)

Relying on *Celis*¸ minor argues that there were no articulable facts which, taken with the rational inferences from those facts, would give the officers reasonable suspicion to believe anyone was inside the trailer who presented any danger to them. *Celis*, however, does not aid him. In *Celis*, the defendant was part of a drug trafficking ring transporting and selling cocaine, which was concealed inside large truck tires. (*Celis*, *supra*, 33 Cal.4th at pp. 671-673.) Police followed the defendant to his home and witnessed him rolling a truck tire from his house to a waiting coconspirator. (*Id*. at p. 672.) The police detained the defendant in his backyard and, because a detective had observed that the defendant lived with his wife and "'possibly a male juvenile,'" the police entered the defendant's home "to determine if there was anyone inside who might endanger their safety." (*Ibid*.) They found no one; however, in a wooden box large enough to conceal a person, they found wrapped packages of cocaine. (*Id*. at pp. 672-673.)

Our Supreme Court held that the facts in *Celis* did not create reasonable suspicion of danger to police justifying a protective sweep of the defendant's home. The court noted that the police detained the defendant in his backyard (not in the house) and reasoned that because officers had not been keeping track of who was in the house, "they had no knowledge of the presence of anyone in [the] defendant's house," and "when they entered the house to conduct a protective sweep, they did so without 'any information as to whether anyone was inside the house.'" (*Celis*, *supra*, 33 Cal.4th at p. 679.) The court further noted that there was no indication that the defendant or his coconspirator were armed when police detained them (*ibid*.), and that police had found no weapons during

earlier investigations of the drug trafficking ring. (*Id*. at p. 672.) Considering all these facts together, the court held that the officers had no grounds for reasonable suspicion of the presence of persons who threatened the officers' safety. (*Id*. at pp. 679-680.)

Taken out of context, language in *Celis* could be read to indicate that police may not conduct a protective sweep of a home if they have "no knowledge of the presence of anyone" in that dwelling and no "information as to whether anyone was inside the house." (*Celis, supra*, 33 Cal.4th at p. 679.) The court made it clear, however, that "[a] protective sweep of a house for officer safety, as described in *Buie, does not* require probable cause to believe there is someone posing a danger to the officers in the area to be swept," but "can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person." (*Celis*, at p. 678.)

Based on the totality of the circumstances in the instant case, and unlike those in *Celis*, the officers had grounds for reasonable suspicion that unknown individuals might be in the trailer. The officers could reasonably suspect that there were other family members in the trailer, as they had already encountered a 12-year-old boy and the parolee inside. They also could reasonably suspect that other people in the trailer could attempt to protect the parolee from the officers, like the 12-year-old boy, who apparently lied about the parolee's presence there. Minor argues that the boy was not necessarily trying to protect or aid the parolee by denying his presence. He claims that the boy "was outside the trailer and may simply have been mistaken." However, the evidence showed that the officers encountered the boy as they were going in the front entrance of trailer.

Moreover, the evidence showed that the parolee was detained in the front room, which was a kitchen and living room. The trailer was small, so it was reasonable to infer that the boy knew the parolee was in the trailer, and lied when he denied his presence. In addition, the officers could hear the shower, so they knew someone else was in the trailer. Furthermore, the door to minor's bedroom was only "a few steps," or approximately 20 feet away, from the kitchen area, and the door was closed. These articulable facts created a reasonable possibility of the presence of others in the trailer. These facts, combined with Agent Jacobson's extensive experience in dealing with noncompliant parolees, justified the protective sweep.

Minor again claims, as he did below, that the officers conducted the protective sweep "simply because they had sufficient manpower to do so." However, we agree with the trial court that Agent Jacobson did not testify to that being the reason for the sweep. The agents conducted the sweep because there were enough officers to secure the entire residence, so that they would not have to "feel the need to just extract the parolee and leave." As he explained, the parole agents often needed to communicate with the families at the place where the parolee was detained. Since that could take a while, they needed to ensure the safety of all the officers.

Minor also contends that, once the officers entered the trailer, it was clear that the people inside presented no danger. The purpose of the protective sweep is to search an area *harboring* an individual who could pose a threat of danger. (*Buie, supra,* 494 U.S. at p. 337.) Thus, even though the family members the agents and officers saw when they

first entered the trailer did not pose any apparent threat, the officers were looking for others hidden in another part of the trailer who could pose a threat.

We conclude that the court properly denied minor's motion to suppress because the officers and agents had reasonable suspicion to justify the protective sweep.[3]

II. There Was Sufficient Evidence to Support the Finding That Minor Possessed the Spray Paint and Markers with the Intent to Commit Graffiti

Minor argues that there was insufficient evidence that the spray paint and permanent markers[4] found in his room were usable, and that he possessed them with the intent to commit vandalism or graffiti. We disagree.

A. *Standard of Review*

"The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials. [Citation.] . . . This court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that support the finding of the juvenile court. [Citation.]" (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275.)

---

[3] We note that minor argues that the search of the trailer was not a valid probation search or a valid parole search. However, since the prosecution did not offer these justifications for the search below, we will not address them on appeal.

[4] We note that the Welfare and Institutions Code section 602 petition did not include possession of markers, but only spray paint.

B. *The Evidence Was Sufficient*

Section 594.2, subdivision (a), provides that "[e]very person who possesses . . . an aerosol paint container, a felt tip marker, or any other marking substance with the intent to commit vandalism or graffiti, is guilty of a misdemeanor."

Minor first argues that the prosecution failed to present any evidence that the cans had any spray paint left in them, or that the markers had any ink left. The status of the spray cans and markers may have been an indicator of whether minor intended to commit vandalism or graffiti, as he alleges. However, section 594.2, subdivision (a), simply required the prosecution to show that minor "possesse[d] . . . an aerosol paint container, a felt tip marker, or any other marking substance with the intent to commit vandalism or graffiti." The focus is on the possession of the tools used for vandalism and/or graffiti, along with intent. There was no explicit requirement to show the spray paint cans had paint in them or the markers had ink. Minor's possession of the spray paint and markers is undisputed.

Relying on *People v. Wimberly* (1992) 5 Cal.App.4th 773 (*Wimberly*), minor further asserts that the prosecution's destruction of the evidence "should have led the juvenile court to infer that the destroyed evidence was unfavorable to the People." However, *Wimberly* does not support his claim. The trial court in that case found that the prosecution's actions in destroying the evidence violated a discovery order. Thus, it instructed the jury that "the improper destruction of evidence could support an inference adverse to the prosecution which may be sufficient to raise a reasonable doubt with respect to the charges relating to [the] appellant's first victim." (*Wimberly*, at pp. 791-

792.) The issue on appeal was whether the trial court erred in refusing to dismiss the relevant charges as a sanction for the prosecution's noncompliance with the discovery order. (*Id*. at p. 792.) *Wimberly* does not stand for minor's proposition that the prosecution's destruction of evidence automatically leads to an inference that the destroyed evidence was unfavorable to the People. We note that the markers and spray paint seized were destroyed per the police department's policy.

Minor next argues that there was insufficient evidence to support a finding that he intended to use the spray paint and markers to commit vandalism or graffiti. "As our Supreme Court has explained, '[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.]' [Citation.] In particular, '[a] jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' [Citation.]" (*People v. Park* (2003) 112 Cal.App.4th 61, 68.)

Here, there was ample evidence of minor's intent to use the spray paint and markers to commit vandalism or graffiti. Officer Block, who had years of experience investigating vandalism and graffiti, observed graffiti and graffiti tools (spray paint and markers) in minor's room. He asked minor if he did any graffiti, and minor admitted that he did. Minor also stated that he went by the monikers "Kaoz" and "Sin." Those were the very words that were written on his bedroom walls with spray paint and markers. Moreover, minor explained that when he did graffiti, he *usually* did it by himself or with one or two friends. This response indicated that minor did graffiti with some frequency.

Viewing the evidence in the light most favorable to the judgment, as we must, we conclude that it was entirely reasonably for the court to infer minor's intent to use the spray paint and markers he possessed to commit vandalism or graffiti. There was sufficient evidence to support the court's true finding.

III. Probation Condition No. 20 Should Be Modified

At disposition, the juvenile court imposed, as a condition of probation, a requirement that minor "[n]ot associate with any known probationer, parolee, or gang member, or anyone known by the probationer to be disapproved of by his/her parent(s) or probation officer." Minor contends, and the People concede, that the term "gang" is unconstitutionally vague and overbroad because it fails to provide a definition of the term "gang." Minor requests that the probation condition be modified to include the term "criminal street gang" contained in section 186.22. We agree that it is appropriate to order modification of the probation condition to incorporate into it the definitions contained in section 186.22, subdivisions (e) and (f). (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 634.)

DISPOSITION

Condition No. 20 is modified to read as follows: "Not associate with any known probationer, parolee, or gang member, or anyone known by the probationer to be disapproved of by his/her parent(s) or probation officer. For purposes of this paragraph, the word "gang" means a "criminal street gang" as defined in Penal Code section 186.22, subdivisions (e) and (f)." In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P.J.

We concur:

McKINSTER
J.

KING
J.